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JUL 1 1972
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No.

In the
Supreme Court of the United States
OCTOBER TERM, 1971

ANDREW JOSEPH SCHAACK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Andrew Joseph Schaack, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit entered on May 31, 1972, in the above entitled cause.

CITATION TO THE OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, printed in Appendix attached hereto, infra, pages 1a-5a is unreported at present.

JURISDICTION

The opinion and judgment of the Court of Appeals were filed and entered on May 31, 1972. This Petition for

Writ of Certiorari will be timely filed on or before June 30, 1972.

The Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

Whether Section 456 (a) is in violation of due process of law guaranteed by the Fifth Amendment to the Constitution of the United States of America?

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the United States Constitution provides in pertinent part:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

STATUTES INVOLVED

Section 454 (b) 50 U.S.C. App. provides in material part as follows:

> "(b) Length of Service.—Each person inducted into the Armed Forces under the provisions of subsection (a) of this section shall serve on active training and service for a period of twenty-four consecutive months, unless sooner released, transferred, or discharged in accordance with procedures prescribed by the Secretary of Defense (or the Secretary of the Treasury with respect to the United States Coast Guard) or as otherwise prescribed by subsection (d) of Section 4 of this Title. The Secretaries of the Army, Navy and Air Force, with the approval of the Secretary of Defense (and the Secretary of the Treasury with respect to the United States Coast Guard), may provide, by regulations which shall be as nearly uniform as practicable, for the release from training and service in the armed forces prior to serving the

periods required by this subsection of individuals who volunteered for and are accepted into organized units of the Army National Guard and Air National Guard and other reserve components."

Section 456 (a) 50 U.S.C. App. provides in material part as follows:

". . . Any person who subsequent to June 24, 1948, serves on active duty for a period of not less than eighteen months in the armed forces of a nation with which the United States is associated in mutual defense activities as defined by the President, may be exempted from training and service, but not from registration, in accordance with regulations prescribed by the President, except that no such exemption shall be granted to any person who is a national of a country which does not grant reciprocal privileges to citizens of the United States: . . ."

SELECTIVE SERVICE REGULATIONS INVOLVED

32 C.F.R. 1622.40, the pertinent text of which is hereafter set forth in the appendix hereto attached (pages 10a-14a).

STATEMENT OF THE CASE

The Petitioner was born in the Grand Duchy of Luxembourg. (A. 51).[1] Prior to the time that he served in the Army of Luxembourg, he consulted with the American Embassy in Brussels, Belgium, regarding his military obligation in the United States, after immigrating to the United States upon completion of military service in Luxembourg. He was told by an official in the American Embassy, "Well, since you are going to be in the Army before you leave towards the States, we do not think

[1] "A" refers to Appendix in the Court of Appeals.

that you will be drafted there." However, that official did not commit himself definitely on that question (A., 54-55). Thereafter, Petitioner served nine months of active duty in the Army of Luxembourg (A. 19-22). Upon completing that service, he immigrated to the United States and registered with Illinois Selective Service System Local Board No. 71. After being ordered for induction by Local Board No. 71, petitioner refused to submit to induction on July 29, 1966 (A. 10). The United States Attorney for the Northern District of Illinois returned the file to Local Board No. 71 for it to consider whether or not it would allow petitioner to return to Luxembourg, given the circumstances under which he entered the United States and registered with the Selective Service System. Local Board No. 71 considered that possibility and refused to grant such permission (A. 10). On February 26, 1968, petitioner was ordered to report for induction on March 28, 1969. The petitioner reported for induction on that date but refused to submit. (A. 7).

On July 31, 1969, an indictment was filed in the Northern District of Illinois, Eastern Division, charging the Petitioner ANDREW JOSEPH SCHAACK, with the offense of willfully and knowingly failing, neglecting and refusing to submit to induction on March 28, 1968, pursuant to the order of his Local Board in violation of Section 462, Title 50 App., U.S.C. The petitioner pleaded not guilty to the indictment on November 19, 1969. On November 19, 1970, the District Court denied the petitioner's motion for a judgment of acquittal, entered a finding of guilty, imposed a sentence of eighteen months in the custody of the Attorney General. A Notice of Appeal was filed on November 25, 1970. (A. 2-4).

Petitioner argued below that Section 456(a), 50 U.S.C., App., was unconstitutional because it provided that an alien would be exempt from the military service in the Armed Forces of the United States, only if he served 18 months of active duty with the Armed Forces of a nation with which the United States is associated in mutual defense, but provided no exemption for active duty less than 18 months. The petitioner contended that there was no rational basis for such classification and that it, thereby violated petitioner's right to equal protection of the laws as safeguarded by the due process clause of the Fifth Amendment of the United States Constitution. The District Court rejected that argument and found that the minimum service of 18 months was not arbitrary and capricious.

On appeal, the Seventh Circuit Court of Appeals affirmed with the following language:

> "We hold that the classification has a rational basis and is not invidiously discriminatory. We agree with the district court finding of the congressional goals. The congressional intentions were to implement our own defenses by strengthening the defenses of our allies, to maintain friendship with our allies, and to further prudent diplomacy in our foreign affairs. We think that these goals are of high legislative priority and are clear from the enactment, and terms, of the statute. How to achieve the appropriate balance in serving these vital national interests clearly called for legislative expertise." C. 3a .[2]

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[2] Footnote 2. refers to Appendix to Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

The Court is being asked to determine an important question of Constitutional Law which it has yet to determine, namely: Is a requirement that petitioner serve 18 months in an Army associated with the United States in mutual defense, in order for petitioner to obtain an exemption from training and service in the United States Armed Forces violative of petitioner's rights to equal protection as guaranteed by the Fifth Amendment to the United States Constitution?

The length of military service which must be served by a person inducted into the United States Armed Forces is governed by Section 454(b), 50 U.S.C., App. It provides a period of two years active duty for inductees with lesser periods for persons in the National Guard or Reserves.

Section 456(a), 50 U.S.C. App., gives the President the authority to exempt persons from such active training and service who have served in the Armed Forces of a nation with which the United States is associated in mutual defense activities.

Any registrant who falls into this category is customarily placed in class IV-A by reason of 32 C.F.R., Section 1622.40(4).

A reading of 32 C.F.R. Section 1622.40 reveals that the registrant may be placed in Class IV-A under the following circumstances:

1) If he is discharged for the convenience of the service after serving a period of not less than six months in a branch of the Armed Forces.

2) If he has served honorably on active duty for a period of not less than one year in one branch of the Armed Forces.

3) If he served twenty-four months of active duty in the Public Health Service.

4) If he served in certain types of reserves, having completed eight years of satisfactory service after a training of not less than three months.

5) If he served in certain National Guard units and completed eight years, training for not less than three consecutive months.

6) If he completed eight years of active service in certain types of reserves with training of not less than four consecutive months.

7) If he completed six years of satisfactory service as a member of any reserve and has ceased to be a member of that reserve.

The sole question in this cause is whether Section 456(a), as implemented by regulation 32 C.F.R. Section 1622.40, is unconstitutionally discriminatory in its application to defendant and, thereby, violates defendant's right to due process as guaranteed by the Fifth Amendment to the United States Constitution.

There is no question that the petitioner served in the Army of Luxembourg from December 11, 1964 until September 4, 1965, a period of nine months. There is also no question that the Grand Duchy of Luxembourg is a nation with which the United States is associated in mutual defense, since it ratified the Northern Atlantic Treaty on June 27, 1949, 63 Stat., 2252, 1949. Had the defendant served eighteen months active duty in the Luxembourg

Army, he would have been automatically entitled to exemption in Class IV-A. The draftee in the Luxembourg Army is required to serve only nine months. (A. 18-42) These pages of the Appendix in the Seventh Circuit Court of Appeals contain the documents regarding petitioner's service in the Luxembourg Army and the documents reflecting the loss of Luxembourg regarding conscription.

Petitioner contends that the distinction drawn by the law between service for eighteen months and service for nine months is arbitrary, capricious and not founded on any legitimate public policy. For that reason, petitioner maintains that this distinction is a discrimination in violation of his right of equal protection as guaranteed by the due process clause of the Fifth Amendment to the United States Constitution.

The petitioner is not contending that Congress could not require that all aliens be subject to the draft, regardless of whether or not they served in an allied army. However, having decided to exempt from military service those aliens who have served in an army of a nation with which the United States is associated in mutual defense, Congress cannot arbitrarily discriminate between such aliens on the basis of the amount of time served, unless there is a showing of some legitimate public policy purpose to be served by such discrimination.

While the Fifth Amendment to the United States Constitution, unlike the Fourteenth Amendment, does not contain an express guarantee of the right of equal protection, the Supreme Court of the United States has recognized that legislation may be so discriminatory that it violates the due process clause of the Fifth Amendment. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). The Ninth

Circuit stated the matter well in *Boylan* v. *United States*, 310 F.2d 493 (CA 9, 1962):

> "But while due process and equal protection cannot be perfectly equated, discriminatory federal legislation may be so removed of any legitimate legislative objective that it violates that basic fairness which constitutes Fifth Amendment due process". 310 F.2d 493 at 500.

It is the position of the petitioner in this cause that the requirement of active duty for eighteen months in the Armed Forces of a nation with which the United States is associated in mutual defense is not supported by any demonstrable legitimate legislative objective.

A review of the legislative history offers no clue as to the legislative purpose for the eighteen month period. That legislative history reads, in pertinent part, as follows:

> ". . . 8. The Senate Amendment also added a new exemption from induction of any person who, subsequent to June 24, 1948, served on active duty for a period of not less than 18 months in the Armed Forces of a nation with which the United States is associated in mutual defense activities if the country of such a person is a citizen grants the same privilege to citizens of the United States. A similar proposal was contained in the H.R. 9007 which passed the House in the last Congress, but did not pass the Senate. The House managers agreed to this portion of the Senate amendment. . . ." U.S. Cong. and Admin. News, 84th Congress, 1955, page 294.

Apart from the above passage, the legislative history in no way reveals why the eighteen month period was chosen by Congress.

Section 456(a) was amended in 1971 and the eighteen month period was reduced to a twelve month period. PL 92-129, Section 101(a)(11), September 28, 1971.

The conference report contains no discussion showing the reasons for the reduction. The legislative history in no way demonstrates that there was some legitimate basis in public policy for an eighteen month period in 1955 and has now changed. This reduction without comment, demonstrates the arbitrary nature of the requirement.

The arbitrary nature of this requirement is further demonstrated by the variety of periods and service that exempt registrants under 32 C.F.R. 1622.40. These are set forth herein above, *supra* pages 6 and 7.

Congress itself requires 24 months service, but allows the President of the United States to make a large number of exceptions to that rule. The President in 32 C.F.R., Section 1622.40, has set up a wide number of types and lengths of service, both inside and outside the Armed Forces, which satisfy the requirements under Section 454(b). Nothing in this entire scheme reveals a legitimate legislative objective for denying exemption to the defendant, simply because he served nine months in the Army of Luxembourg rather than eighteen months.

The Seventh Circuit Court of Appeals stated that the eighteen month requirement had a rational basis:

> "The Congress' intentions were to implement our own defenses by strengthening the defenses of our allies, to maintain friendship with our allies and to further prudent diplomacy in our foreign affairs." C. 3a.

These appeal considerations provided a rational basis for the exemption for aliens who have served in an ally

Army. They do not, however, provide a rational basis for the eighteen month requirement as opposed to any other length of time or any period whatsoever.

In support of its decision, the Court below cited *Smith* v. *United States,* 424 F.2d 269 (CA 9, 1970), *cert. den.* 400 U.S. 848. In that case, the Ninth Circuit Court of Appeals found that exempting men less than 18-½ years old and more than 26 years old from the draft had a reasonable basis in public policy. There is ample physical and emotional data derived from human experience which renders that classification reasonable. Men less than 18-½ years of age or more than 26 years of age are simply not fit for active duty in the military. No similar rational basis is available for the eighteen month requirement particularly when the law and regulation accept so many different lengths and types of service in satisfaction of the statutory requirement.

The Seventh Circuit Court of Appeals also stated that Congress had a rational basis for its time period, because it had evidence before it that nine of the fifty seven nations associated in military defense, had periods of military services from fourteen months to twenty-four months. This evidence cannot provide a rational basis for two reasons. The first is that Congress had no evidence of the periods of military service from forty-eight other nations associated in military defense. The nine hardly provided a representative sample. More importantly, it is the height of irrationality to subject aliens from a country as large as Great Britain with a requirement for a long service in the military and an alien from Luxembourg with a much smaller requirement to the same length of military service. To set the same standard for nations so different, cannot be rational legitimate distinction.

Accordingly, Petitioner respectfully submits that this Court should issue its Writ of Certiorari in order that it may decide this important question of Constitutional law.

CONCLUSION

For the reasons severally and collectively assigned here it is respectfully prayed that this Court issue its Writ of Certiorari to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1971 JANUARY SESSION, 1972

No. 71-1142

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
ANDREW JOSEPH SCHAACK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 61-CR-531

ALEXANDER J. NAPOLI, *Judge.*

ARGUED JANUARY 14, 1972 — DECIDED MAY 31, 1972

Before HASTINGS, *Senior Circuit Judge,* KILEY, *Circuit Judge,* and GORDON, *District Judge.*[1]

KILEY, *Circuit Judge.* Defendant Schaack appeals from his conviction of refusal to submit to induction.[2] We affirm.

The only issue raised by Schaack is the constitutionality of that part of 50 U.S.C. App. §456(a)(1) which provides

[1] District Judge Myron L. Gordon of the Eastern District of Wisconsin is sitting by designation.

[2] 50 U.S.C. App. §462(a).

that "any person who subsequent to June 24, 1948 serves on active duty for a period of not less than eighteen months in the armed services of a nation with which the United States is associated in mutual defense activities . . . may be exempted from training and service, but not from registration."

During 1964-65 Schaack, a native of Luxembourg, served nine months in the Army of Luxembourg and completed his military service there. In October, 1965, he emigrated to the United States and thereafter registered with the Illinois Selective Service System. He was subsequently ordered to report for induction on March 28, 1968. Schaack reported as ordered, but refused to submit, and his indictment, trial and conviction followed.

After close of the evidence at the trial, Schaack's attorney moved for an acquittal on the ground of denial of due process because of alleged discrimination and arbitrariness in the eighteen month requirement of §456(a)(1)[3] and because that requirement was not reasonably related to any legitimate congressional purpose.

The district court denied the motion, finding that the congressional purpose in the eighteen month limitation was "undoubtedly the maintenance of our defense capabilities" by strengthening the military force of our allies without subjecting their military veterans emigrating to this country to undue "double obligation of service;" and that some "minimum length of service was necessary."

---

[3] 50 U.S.C. App. §456(a)(1) provides in pertinent part:

> Any person who subsequent to June 24, 1948, serves on active duty for a period of not less than eighteen months in the armed forces of a nation with which the United States is associated in mutual defense activities as defined by the President, may be exempted from training and service, but not from registration, in accordance with regulations prescribed by the President, except that no such exemption shall be granted to any person who is a national of a country which does not grant reciprocal privileges to citizens of the United States: *Provided*, That any active duty performed prior to June 24, 1948, by a person in the armed forces of a country allied with the United States during World War II and with which the United States is associated in such mutual defense activities, shall be credited in the computation of such eighteen month period.

The statute was amended in 1971 and the eighteen month period was reduced to a twelve month period. PL 92-129, §101(a)(11), September 28, 1971.

The court found no invidious discrimination in Congress' setting the limitation at eighteen instead of nine months.

Schaack argues that the "eighteen months" provision is an arbtirary classification and in violation of his Fifth Amendment due process right. He argues here that the eighteen month requirement is not supported by "any demonstrable" legitimate congressional objective. He states that neither Congress in enacting §456(a)(1) nor the President in promulgating the implementary regulation 32 C.F.R. §1622.40(a)(4) has made a fair distinction between the eighteen month limitation and his nine month Luxembourg Army service and that the distinction is invidiously discriminatory. No case deciding the precise question before us has been cited or found, but we find no merit in Schaack's argument.

We hold that the classification has a rational basis and is not invidiously discriminatory. We agree with the district court finding of the congressional goals. The congressional intentions were to implement our own defenses by strengthening the defenses of our allies, to maintain friendship with our allies, and to further prudent diplomacy in our foreign affairs. We think that these goals are of high legislative priority and are clear from the enactment, and terms, of the statute. How to achieve the appropriate balance in serving these vital national interests clearly called for legislative expertise.

"The power of Congress to classify and conscript manpower for military service is 'beyond question.'" *United States v. O'Brien*, 391 U.S. 367, 377 (1968). This power extends to establishment of a "system of registration for individuals liable for training and service" and to requiring cooperation of individuals within the registration system. And the promulgation of regulations by the President[4] with respect to registration and eligibility classification is "a legitimate and substantial" aid in making the system work. *Id.*

It is true that discrimination "may be so unjustifiable" as to violate the Fifth Amendment due process right.

[4] 50 U.S.C. App. §460(b)(1).

Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The Ninth Circuit, however, in *Smith v. United States,* 424 F.2d 269 (9th Cir. 1970), *cert. den.* 400 U.S. 848, relied, *inter alia,* upon *Bolling v. Sharpe, supra,* in rejecting a contention that the Selective Service Act violated the Fifth Amendment due process clause in exempting "men under 18½ and over age 26" from the draft. The court stated that the Fifth Amendment "merely requires" that all legislative classifications have a reasonable basis.

32 C.F.R. §1622.40 has a wide range of Class IV-A categories, with varying periods of prior service requirements which qualify registrants for exemption from future service.[5]

The exemption provision of §456(a)(1) before us is limited as follows: "except that no such exemption shall be granted to any person who is a national of a country which does not grant reciprocal privileges to citizens of the United States." The reciprocal qualification is specified in this way: ". . . a nation with which the United States is associated in mutual defense activities and which grants exemption from training and service in its armed forces to citizens of the United States who have served . . . in the armed forces of the United States . . . for a period of not less than eighteen months." 32 C.F.R. §1622.40(a)(4).

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[5] A reading of 32 C.F.R. reveals that a registrant may be placed in Class IV-A under the following circumstances:

1. If he is discharged for the convenience of the service after serving a period of not less than six months in a branch of the armed forces.
2. If he has served honorably on active duty for a period of not less than one year in one branch of the armed forces.
3. If he served twenty-four months of active duty in the Public Health Service.
4. If he served in cetrain types of reserves, having completed eight years of satisfactory service after a training of not less than three months.
5. If he served in certain National Guard units and completed eight years, training for not less than three consecutive months.
6. If he completed eight years of active service in certain types of reserves with training of not less than four consecutive months.
7. If he completed six years of satisfactory service as a member of any reserve and has ceased to be a member of that reserve.

It is not disputed that until 1955, when the pertinent provision of §456(a) was enacted,[6] there was no exception or credit given for any person who had already served in the armed forces of a foreign ally. In 1955 only Great Britain and Turkey, of our fifty-nine associates in mutual defense, required, as we do, twenty-four months of military service. The range of service then required in most of the other fifty-seven associate nations was from fourteen to eighteen months.

We think that, for the reasons given, it was clearly within the political function of Congress to require that a person serve eighteen months in the armed forces of a foreign ally in order to qualify for the exemption under §456(a)(1). We cannot say that the congressional classification did not have a rational basis.

We hold therefore that neither the relevant provisions in §456(a)(1) nor those in 32 C.F.R. §1622.40(a)(4) violate due process.

AFFIRMED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1971 JANUARY SESSION, 1972

No. 71-1142

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANDREW JOSEPH SCHAACK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 61-CR-531

ALEXANDER J. NAPOLI, *Judge.*

MAY 31, 1972

This cause came on to be heard on the briefs and transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division and was argued by counsel.

On consideration whereof; it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be and the same is hereby affirmed, in accordance with the opinion of this court filed this day.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. ANDREW JOSEPH SCHAACK, Defendant.	}	No. 69 CR 531

MEMORANDUM ORDER

This is a prosecution for failure to submit to induction in the armed forces as ordered. Following the close of evidence at his trial defendant has moved for an acquittal claiming that the denial of exemption from induction under section 456(a) or 50 U.S.C., App., as applied to him, violates his right to due process of law. The pertinent part of the section provides that:

> . . . Any person who subsequent to June 24, 1948, serves on active duty for a period of not less than eighteen months in the armed forces of a nation with which the United States is associated in mutual defense activities as defined by the President, may be exempted from training and service, but not from registration, in accordance with regulations prescribed by the President, except that no such exemption shall be granted to any person who is a national of a country which does not grant reciprocal privileges to citizens of the United States: . . .

Defendant is a citizen of Luxembourg and has served with the armed forces of that nation on active duty for a period of nine months, the period of service required of draftees. Luxembourg meets the requirements of a "mutual defense nation" as set out in the section. Local

Board Memorandum 76. Defendant was denied classification as IV-A, the class in which registrants who meet the requirements of §456(a) are placed, pursuant to 32 C.F.R. 1622.40(a)(4), due to the fact that he served but nine months rather than the required eighteen months on active duty. The issue thus presented to this court is whether the distinction drawn by Congress between active service for eighteen months and nine months is arbitrary, capricious and not reasonably related to any legitimate legislative purpose, so that the distinction constitutes a discrimination violative of the basic equal protection of law required by the due process clause of the Fifth Amendment.

While the Fifth Amendment does not expressly guarantee equal protection of the law as does the Fourteenth Amendment, a discrimination may be so arbitrary and unjustifiable as to be violative of due process of law. If a legislative classification is not reasonably related to any proper governmental objective and imposes a burden that constitutes an abritrary deprivation of liberty, it violates due process. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954). Under the above standards, this court is of the opinion that section 456(a) as applied to the defendant does not violate the due process clause.

Defendant argues that the requirement of eighteen months rather than nine months is arbitrary and capricious. Defendant indicates that in Class IV-A are placed those registrants who are, by virtue of different minimum lengths of service, deemed to have completed their obligation, and that requiring defendant to serve 18 months for no reasonable relationship to the required lengths of service for inclusion of other registrants in Class IV-A. It was the President's intent as manifested in 32 C.F.R. 1622.40 to exempt from further service those individuals who have completed some minimum length of service depending on the nature of their particular situation. This court cannot agree that these different lengths of service for each type of registrant in Class IV-A are arbitrary.

Rather it is apparent that the President carefully considered the different nature of service rendered by individuals who may qualify for Class IV-A and set the minimum length of service requirement for such a classification accordingly. Thus, a member of the Public Health Service who does not serve in the armed forces must serve two years while a reservist must complete an eight year tour which includes at least three months training. A member of the armed forces who serves honorably on active duty may qualify after one year's service while one discharged for the convenience of the service need only serve six months. The nature and value of the service rendered is the determining factor for the length which the individual must serve in order to qualify for classification as IV-A. The same is true in the defendant's case. Congress has determined that after some minimum length of service in the armed forces of a mutual defense nation the individual should be relieved from an obligation of further service in our armed forces. The value of defendant's service in a foreign armed forces to our defense efforts has apparently been considered in the setting of the requirement of eighteen months service on active duty. The weight to be assigned to a requirement of eighteen months service as opposed to a lesser amount is a task for Congress, not this court. The purpose that Congress was trying to effectuate by this section is undoubtedly the maintenance of our defense capabilities through the strengthening of our allies as well as relieving registrants from double obligation of service. Finding that some minimum length of service is necessary, this court can not say that requiring eighteen months service is unreasonably related to effectuating such purpose.

Nor can the fact that minimum service required by Congress was set at eighteen months can be said to be arbitrary and capricious. Some minimum length of service had to be set, even if it was only one day's service. It is true that there is no real distinction between serving seventeen months and twenty-nine days or eighteen months.

But some line had to be drawn, and the distinction between one day before and one day after is bound to be arbitrary. But it is not the type of arbitrariness that would constitute a violation of equal protection or due process, for a rational scheme supports it; some minimum standard had to be fixed, a cut off point had to be determined.

In accordance with the foregoing, defendant's motion for acquittal at the close of the evidence is hereby denied.

Enter:

/s/ Alexander J. Napoli
United States District Judge

Dated: November 19, 1970

CLASS IV

1622.40 Class IV—A: Registrant Who Has Completed Service; Sole Surviving Son—(a) In Class IV-A shall be placed any registrant who falls within any of the following categories:

(1) A registrant who subsequent to September 16, 1940, was discharged or transferred to a reserve component of the Armed Forces for the convenience of the Government after having served honorably on active duty for a period of not less than six months in the Army, the Air Force, the Navy, the Marine Corps, or the Coast Guard.

(2) A registrant who has served honorably on active duty after September 16, 1940, for a period of not less than one year in the Army, the Air Force, the Navy, the Marine Corps, or the Coast Guard.

(3) A registrant who has served on active duty for a period of not less than twenty-four months as a commissioned officer in the Environmental Science Services Administration or in the Public Health Service, provided that such period of active duty in the Public Health Service as a commissioned reserve officer commencing after the date of enactment of the Military Selective Service Act of 1967 shall have been

performed by the registrant while assigned to staff any of the various offices and bureaus of the Public Health Service including the National Institutes of Health, or while assigned to the Coast Guard, or the Bureau of Prisons of the Department of Justice, or the Environmental Science Services Administration.

(4) A registrant who has served on active duty subsequent to June 24, 1948, for a period of not less than eighteen months in the armed forces of a nation certified by the Department of State to be a nation with which the United States is associated in mutual defense activities and which grants exemption from training and service in its armed forces to citizens of the United States who have served on active duty in the Armed Forces of the United States subsequent to June 24, 1948, for a period of not less than eighteen months: *Provided,* That in computing such eighteen-month period, there shall be credited any active duty performed by the registrant prior to June 24, 1948, in the armed forces of a country allied with the United States during World War II and with which the United States is associated in such mutual defense activities: *And provided further,* That all information which is submitted to the local board concerning the registrant's service in the armed forces of a foreign nation shall be written in the English language.

(5) A registrant who after becoming a member of a unit of the Ready Reserve of a reserve component of the Armed Forces by enlistment prior to August 1, 1963, under the provisions of section 262 of the Armed Forces Reserve Act of 1952, as amended, has continued to serve satisfactorily as such member or as a member of another reserve component, the Army National Guard, or the Air National Guard, as the case may be, and who has completed eight years of such satisfactory service during which he has performed an initial period of active duty for training of not less than three months.

(6) A registrant who after becoming a member of an organized unit of the Army National Guard or the Air National Guard by enlistment or appointment prior to attaining the age of 18 years and 6 months and prior to September 3, 1963, has continued to serve satisfactorily as such member or as a member of another reserve component, the Army National Guard, or the Air National Guard, as the case may be, and who has completed eight years of such satisfactory service during which he has performed active duty for training with an armed force for not less than three consecutive months.

(7) A registrant who after becoming a member of the Ready Reserve of any reserve component of the Armed Forces, the Army National Guard, or the Air National Guard by enlistment or appointment on or after September 3, 1963, and prior to attaining the age of 26 years, has served satisfactorily as such member or as a member of another reserve component, the Army National Guard, or the Air National Guard, as the case may be, and who has completed six years (or eight years if so obligated under the provision of section 6(d)(1) of the Military Selective Service Act of 1967) of such satisfactory service during which he has performed active duty for training with an armed force for not less than four consecutive months.

(8) A registrant who after completion of six years of satisfactory service as a member of one or more reserve components of the Armed Forces has ceased to be a member of any reserve component of the Armed Forces.

(9) A registrant, other than a registrant referred to in subparagraph (5) or (6) of this paragraph, who has completed six years of satisfactory service as a member of one or more of the Armed Forces including the reserve components thereof.

(10) A registrant who is the sole surviving son of a family of which the father or one or more sons

or daughters were killed in action or died in line of duty while serving in the Armed Forces of the United States, or subsequently died as a result of injuries received or disease incurred during such service: *Provided,* That no registrant shall be placed or retained in Class IV—A under the provisions of this subparagraph (i) if he volunteers for induction, or (ii) during the period of a war or national emergency declared by the Congress after July 7, 1964.

(b) For the purpose of computation of periods of active duty referred to in subparagraphs (1), (2), or (3), of paragraph (a) of this section, no credit shall be allowed for—

(1) Periods of active duty training performed as a member of a reserve component pursuant to an order or call to active duty solely for training purposes;

(2) Periods of active duty in which the service consisted solely of training under the Army specialized training program, the Army Air Force college training program, or any similar program under the jurisdiction of the Navy, Marine Corps, or Coast Guard.

(3) Periods of active duty as a cadet at the United States Military Academy, United States Air Force Academy, or United States Coast Guard Academy, or as a midshipman at the United States Naval Academy, or in a preparatory school after nomination as a principal, alternate, or candidate for admission to any of such academies;

(4) Periods of active duty in any of the Armed Forces while being processed for entry into or separation from any educational program or institution referred to in subparagraphs (2) or (3) of this paragraph; or

(5) Periods of active duty performed by medical, dental, or allied specialists in student programs prior to receipt of the appropriate professional degree or in intern training.

(6) Periods of active duty of members of the Reserve of the Public Health Service commencing after the date of enactment of the Military Selective Service Act of 1967 other than when assigned to staff any of the various offices and bureaus of the Public Health Service, including the National Institutes of Health, or the Coast Guard or the Bureau of Prisons of the Department of Justice, or the Environmental Science Services Administration.

Packet No. 67-11
27 November 1970

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-15

ANDREW JOSEPH SCHAACK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

STATEMENT

Petitioner seeks review of his conviction for refusing to submit to induction into the armed forces.[1] The facts are not in dispute.

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[1] The judgment of the court of appeals affirming the conviction was entered on May 31, 1972. The petition was filed on July 1, 1972, and thus is out of time under Rule 22(2) of the Rules of this Court.

Petitioner satisfied his military obligation in his native Luxembourg by nine months of army service before he emigrated to the United States. Upon arrival here, he registered as required by the Selective Service Act, requesting classification as exempt from military service due to his prior service in his native country. This was denied since his service was not long enough to qualify for exemption under the applicable statute (50 U.S.C. App. 456(a)), which requires 18 months of active service in an allied army. Petitioner was ordered to report for induction on March 28, 1968. He reported, but refused to submit to induction. His conviction by the district court (Pet. App. 7a-10a) was affirmed by the court of appeals (Pet. App. 1a-5a). Even apart from the untimeliness of the petition, the asserted constitutional question raised does not merit review.

Petitioner's sole claim is that the requirement in Section 456(a) of a minimum of 18 months service in the armed services of a United States ally is so arbitrary and capricious as to violate due process of law. Both courts below held that the proper legislative determination of a reasonable cut-off point is adequately related to a proper government objective, and does not constitute an arbitrary deprivation of liberty. See *Smith* v. *United States*, 424 F. 2d 267 (C.A. 9). They further noted that the necessary balancing of the various national defense and diplomatic interests required in determining the value to be given various periods of foreign military service "clearly called for legislative expertise" (Pet. App. 3a, 9a).

It is for Congress to assess the lengths of service required by allied military forces and to consider the nature of foreign military training in deciding how much foreign service suffices to justify an exemption from the two-year obligation for service in the United States armed forces. An eighteen month cut-off is well within the range of reasonableness.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

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